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GENERAL PRINCIPLES OF LAW: THE GENTLE GUARDIANS OF SYSTEMIC INTEGRATION OF INTERNATIONAL LAW

Abstract:
There are different meanings and functions of what is called a "general principle of law." This article seeks to address their importance as the basis for the systemic integration of the international legal order. When international law is considered as a legal system, its normative unity and completeness seems essential. This article argues that general principles of law are a necessary, although less visible, element of international legal practice and reasoning, which secure the systemic integration and long-lasting underpinnings of international law. In this sense they may be seen as the gentle guardians of international law as a legal system.

Keywords: coherence of the legal order, completeness of the legal order, general principles of law, international legal reasoning, sources of international law, systemic integration of international law

I. General principles of law (GPsL) are believed to be the most enigmatic sources of international law. That opinion is enhanced by the striking lack of a visible presence of GPsL in international practice, and consequently an absence of rights directly stemming from them.

GPsL are creatures similar to Dworkin's *standards*, i.e. *principles* and *policies*, although the drafters of the Statute of the Permanent Court of International Justice (PCIJ) did not themselves consider them in this way. The principles concern rights, while the policies describe common aims. Both sets of standards – Dworkin argues – point to particular decisions about legal obligations in particular circumstances, but they differ in the character of the direction they give. Principles particularly differ from rules, as rules apply in "an all-or nothing fashion", whereas principles have "the dimensions of weight and importance" and must be taken into account by decision makers as suggesting a given direction without necessitating a particular decision.[1] Principles as such differ

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[1] R. Dworkin, *Taking Rights Seriously*, Harvard University Press, Cambridge MA: 1978, pp. 24, 28.

from the legal rules that may be equally valid in given circumstances. It is interesting that the distinction between principles and rules had been known in international law scholarship prior to Dworkin's *Taking Rights Seriously*. As early as in the 1950s, Gerald Fitzmaurice stated that "a rule answers the question '*what*', a principle in effect answers the question '*why*'."[2] Indeed, principles address primary problems in legal reality and shape the ways in which rules act. Regrettably, this has not been sufficiently taken into account by international courts and tribunals.

Legal reality is not passively experienced and researched by lawyers, including academia. They co-create this reality by their vocabulary, because language fulfils a creative function. Philip Allott claims it to be inherent in the nature of legal systems that writing and talking about the law may itself constitute law.[3] Which is why the vocabulary matters. Indeed, "[…] the limits of the language (*the* language which I understand) mean the limits of my world."[4] Perception, cognition, and understanding of reality is conditioned by the ideas and concepts in our language. Thus, the creative function of vocabulary seems to be beyond questioning. As far as international law is concerned, the recent broad debate about the constitutionalisation of international law has clearly proved this.[5] During this debate the following issue has been prominently discussed: Is constitutionalisation a desirable and effective agenda for international law to be improved? I share the opinion that is supported by, among others, Bruno Simma[6]: If international law scholars want international law to be improved, they should underline its universalism and its systemic character based on such features as coherence, completeness and normative unity. The very nature of those features can cope with what is often considered to be a major threat to international law; namely the fragmentation of legal regulations and proliferation of judicial bodies. The first sentence that opens the *Conclusions of the Study Group of ILC on Fragmentation of International Law* is worth repeating in this context: "International law is a legal system." The next goes on to state that "[i]ts rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them."[7]

[2] G.G. Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 Recueil des cours 1 (1957-II), p. 7.

[3] P. Allott, *Language, Method and the Nature of International Law*, 45 British Yearbook of International Law 79 (1971), p. 118.

[4] L. Wittgenstein, *Tractatus Logico-Philosophicus*, Kegan Paul: 1922, p. 87, para. 5.62.

[5] *See* R. Kwiecień, *International Constitutionalism, Language in Legal Discourse, and the Functions of International Law Scholarship*, in: A. Jakubowski, K. Wierczyńska (eds.), *Fragmentation vs the Constitutionalisation of International Law: A Practical Inquiry*, Routledge, Abingdon/Oxon, New York: 2016, pp. 53 ff.

[6] B. Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 European Journal of International Law 268 (2009), p. 297.

[7] International Law Commission, *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, UN Doc. A/Res/61/34, para. 1(1).

These excerpts from the International Law Commission's statement literally and substantively differentiate rules from principles, as did, e.g., Dworkin and Fitzmaurice. This article argues that it is GPsL that protect the systemic features of international law, and, consequently, its transparency and efficiency. Thus, GPsL are the guardians of the systematic character of international law. As such they provide international law with predictability.

II. The value judgments of scholars normally carry political implications even though, unlike States and intergovernmental organisations, scholars are not direct law-makers. Thus, scholars may be seen as political actors, especially when their language is characterised by the phenomenon of reification, that is to say, turning conceptual entities into real things. This is visible when scholars' aspirations are strongly motivated by political and moral aims.[8] When the international legal language borrows from the moral and political discourse, the legal terminology absorbs some moral and political normativity. This is why the normative significance of the conceptual terms used in legal discourse turns not on the normativity of law as such, but rather on the normativity associated with the moral or political concepts drawn upon. It follows that the use of concepts as intermediate links in legal inferences may work to provoke reactions that international law itself and its main makers – States – cannot provoke. This is what is called "the normative functionality of conceptual terms in international law."[9]

As stated above, there has been a striking lack of visible presence of GPsL in international judicial practice. On one hand, the general principles of private law have been treated by the PCIJ as well as the International Court of Justice (ICJ) as sources of national, not international, law; and on the other hand the general principles of international law have been rooted by the World Court in international customs and treaties.[10] The World Court and other courts and tribunals have not used, as yet, the potential of GPsL as meaningful instruments for judicial creativity and innovation, because they have, so far, used them "sparingly."[11] The Hague Court in particular has not yet based any of its judgments on GPsL themselves, because it has denied their status as autonomous sources of legal obligations. The position of the good faith principle in its case-law is quite symptomatic of this point. In *Border and Transborder Armed*

[8] J. Boyle, *Ideals and Things: International Legal Scholarship and the Prison-house of Language*, 26 Harvard International Law Journal 327 (1985), pp. 349-351.

[9] U. Linderfalk, *The Functionality of Conceptual Terms in International Law and International Legal Discourse*, 6 European Journal of Legal Studies 27 (2013/2014), p. 37.

[10] This approach has not been entirely shared by the International Law Commission. In Chapter VIII of its *Report on the work of the sixty-ninth session (2017)* (A/72/10), the ILC states: "General principles of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice can also serve as the basis for *jus cogens* norms of international law" (draft conclusion 5(3)). Nonetheless, the leading importance of customary international law is also underlined by the ILC, as follows: "Customary international law is the most common basis for the formation of *jus cogens* norms of international law" (draft conclusion 5(2)).

[11] V. Lowe, *International Law*, Oxford University Press, Oxford: 2007, p. 88.

Actions it stated, following its *Nuclear Test* judgments: "The principle of good faith is, as the Court has observed, 'one of the basic principles governing the creation and performance of legal obligations' […]; it is not in itself a source of obligation where none would otherwise exist."[12]

One can ask what the above means. Could anything that "is not in itself a source of obligation" be a source of law? Secondly, is the function of GPsL governing the creation and performance of legal obligations only a subsidiary one or, in any case, less important than being a direct source of legal obligations? And a third question arises, namely whether the systemic integration function performed by GPsL is more important than the primary rules' function? The answers to these questions are provided below. At this point it is just worth noting that Herbert Hart's *secondary rules* (rules of change, of adjudication, and of recognition) cannot exist without *primary rules*.[13] At the same time, without secondary rules there is just chaos, not a legal system. It is GPsL that protect the systemic underpinnings of international law. They govern the creation and performance of the legal obligations flowing from primary rules, because they fulfil the systemic integration function. The latter is crucial for the legal reasoning that shapes legal practice.

III. Since the *travaux préparatoires* of Article 38 of the PCIJ Statute, there has been a dispute over the justification of the substantive nature of GPsL. The positivist position, defended then by Elihu Root in the Advisory Committee of Jurists, suggested that judges could only decide in accordance with the "recognised rules" and that, in their absence, they should pronounce a *non-liquet*. Besides, for Root the principles of justice mentioned in the drafted Article 38 as "recognised by civilized nations" varied from country to country.[14] Edward Descamps, the President of the Committee, opposed Root's position and replied that this might be "partly true as to certain rules of secondary importance", but "it is no longer true when it concerns the fundamental law of justice and injustice deeply engraved on the heart of every human being and which is given its highest and most authoritative expression in the legal conscience of civilised nations."[15] Descamps and most jurists in the Committee also opposed the possibility of *non-liquet*, asserting that if neither conventional nor customary law existed, the judge ought then to apply general principles. Descamps strongly emphasised that "objective justice is the natural principle to be applied by the judge."[16] Eventually, a clearly compromise

[12] ICJ, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgement, 20 December 1988, ICJ Rep. 1988, p. 69, p. 105, para. 94. *See also* ICJ, *Nuclear Test (Australia v. France)*, Jurisdiction and Admissibility, Judgement, 20 December 1974, ICJ Rep. 1974, p. 253 p. 268, para. 46; *Nuclear Test (New Zealand v. France)*, ICJ Rep. 1974, p. 457, p. 473, para. 49.

[13] *See* H. Hart, *The Concept of Law* (3rd ed.), Clarendon Press, Oxford: 2012, pp. 91-97.

[14] PCIJ/Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee (16 June-24 July 1920) with Annexes*, The Hague 1920, Ann. no. 3, point no. 3, p. 310.

[15] *Ibidem*, pp. 310-311.

[16] *Ibidem*, p. 323. For commentary, *see* B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Stevens & Sons, London: 1953, pp. 6-22; A. Pellet, *Article 38*, in: A. Zimmermann

solution was reached by the Advisory Committee of Jurists between the supporters of Descamps's position and Root's positivist outlook. This compromise was expressed in Article 38(3) of the PCIJ Statute and is now visible in Article 38(1)(c) of the ICJ Statute.

Nonetheless, a dispute continues concerning the normative autonomy of GPsL. Legal positivists are mostly inclined to treat GPsL as incomplete international customs.[17] On the other hand, both in scholarship and in the judiciary there is a starkly different approach to GPsL. Judge Cançado Trindade's views are representative of the autonomous position of GPsL. His reasoning, given in a separate opinion in the *Pulp Mill* case, is worth quoting here:

> The *mens legis* of the expression 'general principles of law', as it appears in Article 38(1)(c) of the ICJ Statute, clearly indicates that those principles constitute a (formal) 'source' of international law, on their own, not necessarily to be subsumed under custom or treaties (…) [A] general principle of law is quite distinct from a rule of customary international law or a norm of conventional international law. A principle is not the same as a norm or a rule; these latter are inspired in the former and abide by them. A principle is not the same as a custom or conventional law.[18]

When the status of GPsL is taken into account, Judge Trindade's point of view is worth deliberating. I share his opinion that rules of customary and conventional international law are inspired by GPsL and abide by them. It follows that GPsL make up the constitutional background for the international legal order. However this raises the following question: Is there a difference between GPsL and what is known as general principles of international law? According to the ICJ, these latter are founded in customs and treaties,[19] but despite that they remain "principles", not rules. And yet another question: What is the ascertainment of the sources of GPsL within the international legal order? Is it based on substantive-law ascertainment criteria connected with the natural-law approach? Or perhaps, a State consent, which constitutes a formal source of law, remains inevitable in this respect? Hersch Lauterpacht's legacy reflects the complexity of the issue. On the one hand, Lauterpacht did not entirely reject the positivistic justification of law, including the significance of State consent in international law,

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et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, Oxford University Press, Oxford: 2006, pp. 684 ff.; O. Spiermann, *International Legal Argument in the Permanent Court of International Justice. The Rise of the International Judiciary*, Cambridge University Press, Cambridge: 2005, pp. 57-62; R. Yotova, *Challenges in the Identification of the "General Principles of Law Recognized by Civilized Nations": The Approach of the International Court*, The University of Cambridge, Faculty of Law Legal Studies Research Paper Series, Paper No. 38/2017, pp. 16-21.

[17] *E.g.* G. Gaja (*General Principles of Law*, in: *Max Planck Encyclopaedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law – Oxford University Press, 2016 (on-line edition), para. 16) regards them as *inchoate customs* that do not require support in a State's practice.

[18] ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Separate Opinion of Judge Cançado Trindade, 20 April 2010, ICJ Rep. 2010, p. 135, 142, para. 17.

[19] *See supra* note 12.

but on the other hand he strongly argued that sources of international law, particularly GPsL themselves, follow the precepts of natural law.[20]

Within the problem of ascertainment of the sources of legal rules, GPsL seem to be the most ambiguous source. As already mentioned, Baron Descampes originally designated them as a measure against *non-liquet* that includes resort to natural law principles, before being subsequently re-constructed as an emanation of national traditions. Those traditions cannot be – according to him – ascertained in international law entirely on formal positivistic grounds, especially on State consent; a position which was later more broadly developed by Hersch Lauterpacht.[21] In this sense, the ascertainment of GPsL is "devoided of any formal character", as claimed by a contemporary commentator.[22]

Indeed, the validity and legitimacy of GPsL are not grounded in State consent. In this sense, they need no formal ascertainment. It is rather the reverse that appears to be true; namely, the legal validity and the ascertainment of State consent and its normative effects come from some GPsL. This is why the latter are an essential factor in legal reasoning. GPsL, as similar to Hart's *secondary rules*, perform the ordering function among norms and confirm their validity. Thus, they support the coherence and completeness of international law independently of State consent.[23] As Gerald Fitzmaurice noted, it is not State consent but GPsL that are essential when a legal order is to perform its basic functions.[24]

The validation and legitimisation of legal rules are accomplished during their interpretation and application, where logical reasoning and its quality is crucial. In particular legal language and its vocabulary, as underlined above, may have a causative influence on legal practice. So, the presence of GPsL in legal vocabulary and their meanings shape the legal reality, since the world of law – actually the human world – is governed by logical and mental regularities. In consequence, it is not GPsL that need State consent to be introduced and legitimate in international law, but rather the latter that needs GPsL to obtain normative validity and practical efficiency. Obviously this is the point of Kant's critical philosophy's origin, as well as of Kelsen's *Grundnorm*'s.

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[20] *See* especially H. Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration*), Longmans, London: 1927; *idem*, *The Function of Law in the International Community*, Clarendon Press, Oxford: 1933.

[21] *See* Lauterpacht (*The Function*), *supra* note 20, pp. 60-84, where Lauterpacht stresses the crucial importance of the completeness of the legal system as a general principle of law.

[22] J. d'Aspremont, *Formalism and the Sources of International Law. A Theory of the Ascertainment of Legal Rules*, Oxford University Press, Oxford: 2011, p. 171.

[23] *See* J.I. Charney, *Universal International Law*, 87 American Journal of International Law 529 (1993), pp. 535-536. *See also* the World Court's judgments which support the independence of GPsL from State consent: PCIJ, *Certain German Interests in Polish Upper Silesia* (Merits), PCIJ Series 1926 A, No. 7, p. 42; PCIJ, *Factory at Chorzów* (Jurisdiction), PCIJ Series 1927 A, No. 9, p. 21; PCIJ, *Factory at Chorzów (Claim for Indemnity)* (Merits), PCIJ Series 1928A, No. 17, p. 29; ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Rep. 1951, pp. 15, 23.

[24] Fitzmaurice, *supra* note 2, pp. 39-40.

IV. The heterogeneous substantive and formal character of GPsL must be taken into account to indicate their functions in international law. They are marked by diverse features, which is responsible for their various normative and logical functions. Some of them may undoubtedly perform the role of Dworkin's *rules*. That role can be attributed to the principles covered by Article 38(1)(c) of the ICJ Statute, or the "general principles of law recognised by civilised nations." They can be directly applied by the Court, "whose function is to decide in accordance with international law such disputes as are submitted to it." As is known, a long-standing controversy concerns their nature. Are they *private law analogies* or emanations of natural law? The former meaning is nowadays supported by Article 21(1)(c) of the Statute of the International Criminal Court (ICC). It entitles the ICC to apply

> general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards.

Needless to say, under Article 21(1)(c) of the ICC Statute GPsL, firstly, do not follow from customs and treaties, and secondly their role comes down to filling in gaps. But the issue still remains open whether GPsL are just simplistic borrowings from national legal orders. In other words, are they a generalisation based on a comparison of norms from "civilised national legal orders"? If so, one should share the opinion that the principle of good faith makes up a crucial criterion for belonging to "civilised legal orders."[25] For this reason the principle of good faith should be seen as a fundamental constitutional principle of the law. At the same time, the application of national legal principles in the international legal order is effective when it is appropriate for international relations or when it works within the systemic specificity of international law.[26]

V. But it is not this kind of GPsL that is the most meaningful for the systemic integration function of international law. That key function in international legal reasoning is performed by the principles which built the "constructivist thinking" in legal argumentation.[27] They are "intrinsic to the idea of law"[28] or "principles of legal

[25] *See* M. Kałduński, *Zasada dobrej wiary w prawie międzynarodowym* [The principle of good faith in international law], C.H. Beck, Warszawa: 2017, pp. 68-88; R. Kolb, *Principles as Sources of International Law (with Special Reference to Good Faith)*, 53 Netherlands International Law Review 1 (2006), p. 9; A. Kozłowski, *Estoppel jako ogólna zasada prawa międzynarodowego* [Estoppel as a general principle of international law], Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław: 2009, p. 40; U. Linderfalk, *What Are the Functions of the General Principles? Good Faith and International Legal Pragmatics*, available at: https://ssrn.com/abstract=2955648 (accessed 30 June 2018).

[26] O. Schachter, *International Law in Theory and Practise: General Course in Public International Law*, Martinus Nijhoff, Dordrecht/Boston/London: 1991, p. 50.

[27] M. Koskenniemi, *General Principles: Reflections on Constructivist Thinking in International Law*, in: M. Koskenniemi (ed.), *Sources of International Law*, Ashgate Publishing, New York: 2000, p. 361.

[28] Schachter, *supra* note 26, pp. 53-54.

logic", that is measures of legal reasoning leading to legal effects.[29] Thus, they are essential elements of legal argumentation. Without them, what is labelled as *legal logic* is simply not possible.

The function performed by such principles consists in the justification of coherence, stability, and the efficiency of both substantive and procedural sources of international law, as well as the rights and obligations flowing from them. It is a purely rhetorical question whether the efficiency and stability of treaty and customary rights and obligations could exist without such principles, or actually meta-principles, as *bona fides*, *pacta sunt servanda* and *estoppel*. This is exactly the meaning represented in the ICJ's reasoning when it spoke of the principle of good faith as "one of the basic principles governing the creation and performance of legal obligation."[30] These principles are neither rules nor vague ideas. They are rather norm-sources, which aim to develop the rules of constitutional importance.[31] It is due to them that international law may be seen as a legal order. They are "*generic principles*" which are to "systemise the interacting subsystems of society."[32] Therefore, GPsL, gently but meaningfully, serve as the guardians of the systematicity of norms within international law. They determine the relationships between norms as guidelines when international law is interpreted and applied, which supports both the codification process and the progressive development of international law. Their systemic integration function cannot be underestimated.

VI. If international law is to be seen as a legal system, then its coherence, completeness and normative unity seem decisive. These features of international law should be protected in the legal reasoning whereby the systemic integration of international law is achieved. The constructivist thinking of lawyers may make them invisible law-makers. But this constructivist thinking is not possible without GPsL. Thus, GPsL, as the indispensable measures of action for the invisible law-makers, are *nolens volens* the guardians of the systemic integration of international law.

[29] J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, Cambridge University Press, Cambridge: 2003, pp. 129-131.

[30] *See* ICJ, *Nuclear Tests (Australia v. France)*, p. 268, para. 46.

[31] *See* Kolb, *supra* note 25, p. 9.

[32] P. Allott, *Eunomia: New Order for a New World*, Oxford University Press, Oxford: 2001, pp. 167-168.